UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:11-bk-07194-FMD
Chapter 7

Gregory Andrew Stranger,

Debtor.
_____/

Elizabeth B. Ross,

Plaintiff,

v.

Adv. Pro. No. 9:11-ap-1115-FMD

Gregory Andrew Stranger,

Defendant.
_____/

ORDER DENYING MOTION TO DISMISS

THIS PROCEEDING originally came on for hearing on January 25, 2012, on Defendant's *Motion to Dismiss Complaint* (Doc. No. 20) (the "Motion to Dismiss"). In her Complaint (Doc. No. 1), Plaintiff seeks a determination that her claim against Defendant is non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6).[1] Plaintiff's claim arises from a judgment she obtained against Defendant following a California state court jury verdict (the "California Judgment"). Plaintiff attached a copy of both the California state court complaint (the "State Court Complaint") and the California Judgment as exhibits to her Complaint.

In his Motion to Dismiss, Defendant argued, *inter alia*, that the Complaint failed to state a claim for which relief can be granted because, at the time the Complaint was filed, the California Judgment was on appeal and was, therefore, not a final judgment. At the January 25, 2012 hearing, Plaintiff's counsel, conceding that an appeal of the California Judgment was pending, moved *ore tenus* to abate the proceeding until such time as the appellate process had concluded. The Court granted that motion.

On June 20, 2013, Plaintiff filed a *Notice of Decision from the State of California Court of Appeal, First District in Case No. A130071 and Notice that Court may Terminate the Abatement of this Adversary Proceeding and that the Matter may Proceed* (Doc. No. 32) (the "Notice"). The Notice attached a copy of the opinion of California's First District Court of Appeals that affirmed the California Judgment. Shortly thereafter, Plaintiff filed a motion for summary judgment (Doc. No. 33) (the "Summary Judgment Motion"). At a status conference conducted on September 5, 2013, the Court determined that no further appeals have been filed and that the California Judgment is now a final judgment. Accordingly, the Court terminated the abatement, established a briefing schedule on the Summary Judgment Motion, and set a hearing on the Summary Judgment Motion for November 19, 2013 (Doc. No. 51). Defendant has filed an opposition to the Motion to Summary Judgment (Doc. No. 56), in which he correctly points out that this adversary proceeding is not yet at issue, and that the Court has yet to rule on his Motion to Dismiss.[2] Defendant, in his opposition to the Summary Judgment Motion, also seeks a continuance of the November 19, 2013 hearing pursuant to Fed. R. Civ. P. 56(d). By separate order, the Court has scheduled a hearing on Defendant's request for continuance of the hearing on the Summary Judgment Motion.

The Court, having reviewed the Complaint and the Motion to Dismiss, finds that the Complaint sufficiently states claims upon which relief may be granted. For the following reasons, the Motion to Dismiss is denied.

LEGAL ANALYSIS

Defendant's Motion to Dismiss relies on Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b). That rule allows Defendant to test the legal sufficiency of the allegations of the Complaint.[3] The Court must accept the well-pleaded factual allegations as true, construing them in the light most favorable to

[1] Unless otherwise stated, all statutory citations are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq*.

[2] The fact that Defendant has not yet filed an answer does not preclude the Court from considering the Summary Judgment Motion. *See* Fed. R. Civ. P. 56(b), incorporated by Fed. R. Bankr. P. 7056, which allows a party to file a motion for summary judgment at any time until 30 days after the close of all discovery. *See also Eastland Music Group, LLC v. Lionsgate Entertainment, Inc.*, 707 F.3d 869, 871 (7th Cir. 2013) (explaining that under Rule 56(b), a motion for summary judgment can be filed at any time, leaving the adverse party with an obligation to show a need for discovery under Rule 56(d)).

[3] *Bankers Life Ins. Co. v. Credit Suisse First Boston Corp.*, 2008 WL 1817294, *3 (M.D. Fla. Apr. 22, 2008).

Plaintiff.[4] Of course, the United States Supreme Court has clarified in *Twombly*[5] and *Iqbal*[6] the level of factual specificity and support necessary for allegations to be deemed sufficient.

In *Twombly*, the Court declined to require "heightened fact pleading of specifics,"[7] but did require plaintiffs to allege "enough facts to state a claim to relief that is plausible on its face."[8] In *Iqbal*, the Court clarified that a claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[9] Threadbare recitals of the elements of a claim, or naked legal conclusions devoid of factual support, are insufficient.[10] Only plausible claims, supported by well-pleaded factual allegations, can withstand a Rule 12(b)(6) motion to dismiss.[11]

With the *Iqbal* and *Twombly* pleading standards in mind, the Court turns to Plaintiff's claims to determine whether each element of the cause of action is properly supported by the requisite factual allegations.

Count I – § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from a debtor's discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud." Parsing that language, courts have held that a plaintiff pursuing a § 523(a)(2)(A) claim must establish that (i) the debtor made a false statement with the purpose and intention of deceiving the creditor; (ii) the creditor justifiably relied on such false statement; and (iii) the creditor sustained damage as a result of the false statement.[12] Thus, in order to withstand the Motion to Dismiss, Plaintiff must plead factual allegations demonstrating that Defendant is plausibly liable for each of the foregoing elements.

Defendant argues that Plaintiff has not alleged the necessary facts to support the claim and, instead, relies entirely on the attached State Court Complaint and California Judgment. In paragraph 10 of the Complaint, Plaintiff incorporates by reference all of the factual allegations set forth in the State Court Complaint. Under the applicable rules of procedure and well established, controlling circuit court law, Plaintiff may permissibly rely on attached and incorporated materials in support of her claim, and this Court may consider such attachments to the Complaint without converting the Motion to Dismiss into a motion for summary judgment.[13] Accordingly, the Court must review the State Court Complaint to determine whether the necessary factual allegations under *Twombly* and *Iqbal* have been alleged in support of the elements of the § 523(a)(2)(A) claim.[14]

Plaintiff alleged in the State Court Complaint that Defendant misrepresented to her that, in exchange for a $100,000 capital contribution, he would agree to an equal (50%-50%) ownership structure and equal cash flow distributions from the joint business venture that the parties were undertaking together.[15] Plaintiff further alleged that after she provided the $100,000 capital contribution to Defendant, he refused to honor their agreement and also failed to return her money.[16] Additionally, Plaintiff alleged that Defendant failed to disclose to her that he had been convicted, years earlier, of a felony for "stealing money from his bank employer,"[17] and that he had served time in a foreign prison on account of that conviction.

Moreover, Plaintiff alleged in the State Court Complaint that she was unaware until after she had made her capital contribution to Defendant that he had

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[4] *Speaker v. U.S. Dep't of Health & Human Services Centers for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010).
[5] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[6] *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
[7] *Twombly*, 550 U.S. at 570.
[8] *Id.*
[9] *Iqbal*, 556 U.S. at 678.
[10] *Id.*
[11] *Id.* at 679.
[12] *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996).
[13] *See* Fed. R. Civ. P. 10(c), incorporated by Fed. R. Bankr. P. 7010, which states that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." *See also Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir. 1984) (holding that trial court properly examined a contract attached to a complaint in ruling on a Rule 12(b)(6) motion to dismiss); *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1315 (M.D. Fla. 2000) ("documents attached to an amended complaint may be considered under Rule 12(b)(6) without converting the motion into one for summary judgment") (citing Fed. R. Civ. P. 10(c)).
[14] *See In re McGloster*, 2013 WL 2436464 (Bankr. N.D. Ga. Apr. 30, 2013) (applying *Twombly* and *Iqbal* to a § 523(a)(2)(A) claim); *In re Ippolito*, 2013 WL 828316 (Bankr. E.D.N.Y. Mar. 6, 2013) (same); *In re Hanley*, 2009 WL 2827952 (Bankr. D. Mass. Sept. 1, 2009) (same).
[15] *See* State Court Complaint, ¶¶ 23-25 (Doc. No. 1, Exh. 1 – Part A, pp. 9-10).
[16] *See* State Court Complaint, ¶¶ 37, 39 (Doc. No. 1, Exh. 1 – Part A, pp. 13-14).
[17] *See* State Court Complaint, ¶40 (Doc. No. 1, Exh. 1 – Part A, pp. 14-15). Defendant's actions as described in the State Court Complaint can perhaps better be characterized as illegal trading.

been convicted of the felony, and that she relied on Defendant's representations that he was a trustworthy and financially stable individual in making the decision to go into business with him, to trust him with her capital contribution, to commit herself to personal liability and financial exposure for various business obligations, and to introduce him to her network of business contacts as a reputable individual.[18]

Finally, Plaintiff alleged the various ways in which she was damaged as a result of Defendant's misrepresentations and omissions, including, most directly, the loss of her unreturned $100,000 capital contribution. Plaintiff also alleged specific causes of action for "fraud – intentional misrepresentation" (Count 6 of the State Court Complaint) and "fraud – failure to disclose" (Count 8 of the State Court Complaint). The jury's verdict in Plaintiff's favor, together with the corresponding entry of the California Judgment on those counts against Defendant, confirms Plaintiff's damages.

All of those allegations, together with the resulting jury verdict and judgment, support the elements of a § 523(a)(2)(A) claim. And because the allegations were incorporated in the Complaint herein, the Court finds that Plaintiff has sufficiently pleaded a cause of action under § 523(a)(2)(A).

Count II – § 523(a)(6)

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Both the willful and malicious elements must be satisfied in order for the exception to apply. Thus, in order to satisfy the *Twombly* and *Iqbal* pleading standards, a plaintiff must plead factual allegations that allow the court to draw the reasonable inference that the defendant (i) intended to and did cause an injury; (ii) acted willfully; and (iii) acted maliciously.[19] Omissions can also serve as the basis for a § 523(a)(6) claim if such omissions were calculated by the debtor-defendant in a willful and malicious manner to cause injury.[20]

Concerning the "willful" element of the claim, the United States Supreme Court, in *Kawaauhau v. Geiger*,[21] clarified the question of whether the § 523(a)(6) discharge exception encompassed intentional acts that happen to cause injury, or rather only acts that were committed with the actual intent to cause injury. The Court held that only those acts committed with the actual intent to cause injury fall within the § 523(a)(6) exception. In other words, an intentional act that results in an unintended injury does not give rise to a § 523(a)(6) claim. And while the Supreme Court has not articulated the state of mind necessary to establish the intent to cause injury, the Eleventh Circuit has confirmed that the requisite intent exists if the defendant either subjectively intended to injure the creditor or the defendant's actions were substantially certain to cause injury.[22]

As for the malicious element, the Eleventh Circuit has defined malicious to mean "wrongful and without just cause" or "excessive even in the absence of personal hatred, spite or ill-will."[23] A showing of specific intent to harm is not necessary to establish malice for purposes of a § 523(a)(6) claim.[24]

Thus, the question here is whether Plaintiff has pleaded factual allegations that plausibly support the assertion that Defendant wrongfully, and without just cause, committed acts or omitted necessary information with the subjective intent to cause injury to Plaintiff. A review of the allegations in the State Court Complaint reveals that the answer is "yes."

Plaintiff alleged that Defendant represented to her that he would agree to an equal ownership and cash flow distribution scheme in exchange for Plaintiff's $100,000 capital contribution.[25] Plaintiff further alleged that Defendant, after securing the capital contribution, refused to honor the parties' agreement and also failed to return the $100,000 to Plaintiff.[26] Plaintiff also alleged that Defendant failed to disclose to Plaintiff, both before and during the course of their business dealings together, that he was a convicted felon who had served prison time for stealing/illegal trading.[27] The Court may reasonably infer from these allegations that Plaintiff has sufficiently alleged that Defendant intended to defraud Plaintiff, and that he subjectively intended to cause the economic harm that has resulted and for which the state court jury attempted to compensate Plaintiff. The Court

[18] *See* State Court Complaint, ¶¶ 41-42 (Doc. No. 1, Exh. 1 – Part A, p. 16).
[19] *In re Wiszniewski*, 2010 WL 3488960, *8 (Bankr. N.D. Ill. Aug. 31, 2010).
[20] *In re Hansen*, 473 B.R. 240, 257 (Bankr. E.D. Tenn. 2012) (citing *In re Sintobin*, 253 B.R. 826, 830 (Bankr. N.D. Ohio 2000)).
[21] 523 U.S. 57 (1998).
[22] *In re Jennings*, 670 F.3d 1329, 1334 (11th Cir. 2012).
[23] *Id.* (internal citations omitted).
[24] *Id.*
[25] *See* note 15, *supra*.
[26] *See* note 16, *supra*.
[27] *See* notes 17-18, *supra*.

concludes that Plaintiff has stated a plausible claim for relief under § 523(a)(6).[28]

Accordingly, it is

ORDERED

1. Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted is DENIED.

2. Defendant shall have twenty-one (21) days from the date of this order to file an answer to the Complaint.

DONE and **ORDERED** in Chambers at Tampa, Florida, on November 5, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge

This Order shall be served on all parties and counsel by CM/ECF.

[28] This ruling does not necessarily mean that Plaintiff will ultimately prevail on her § 523(a)(6) claim at trial or on summary judgment. As several courts have noted, an underlying state court judgment may be insufficient to support a § 523(a)(6) claim if the finder of fact in the underlying case did not specifically address the willful and/or malicious nature of the defendant's actions, or if those elements were not actually litigated. *See, e.g., In re Kulik*, 2007 WL 6334815 (M.D. Fla. Aug. 27, 2007). But the Court need not address this issue at this point in the proceeding because it does not constitute a basis for dismissal.